

## § 76.19

(14) Exercise such other authority as necessary to carry out the responsibilities of the Judge under this part.

(c) The Judge does not have the authority to rule upon the validity of federal statutes or regulations.

### § 76.19 Prehearing conferences.

(a) *Purpose and scope.* Upon motion of a party or in the Judge's discretion, the Judge may direct the parties or their counsel to participate in a prehearing conference at any reasonable time prior to a hearing, or during the course of a hearing, when the Judge finds that the proceeding would be expedited by such a conference. Prehearing conferences normally shall be conducted by telephone unless, in the opinion of the Judge, such method would be impractical, or when such conferences can be conducted in a more expeditious or effective manner by correspondence or personal appearance. Reasonable notice of the time, place, and manner of the prehearing conference shall be given. At the conference, the following matters may be considered:

- (1) The simplification of issues;
  - (2) The necessity of amendments to pleadings;
  - (3) The possibility of obtaining stipulations of facts and of the authenticity, accuracy, and admissibility of documents, which will avoid unnecessary proof;
  - (4) The limitations on the number of expert or other witnesses;
  - (5) Negotiation, compromise, or settlement of issues;
  - (6) The exchange of copies of proposed exhibits;
  - (7) The identification of documents or matters of which official notice may be required;
  - (8) A schedule to be followed by the parties for completion of the actions decided at the conference; and
  - (9) Such other matters, including the disposition of pending motions and resolution of issues regarding the admissibility of evidence, as may expedite and aid in the disposition of the proceeding.
- (b) *Reporting.* A verbatim record of the conference shall not be kept unless directed by the Judge.
- (c) *Order.* Actions taken as a result of a prehearing conference shall be re-

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duced to a written order unless the Judge concludes that a stenographic report shall suffice or, if the conference takes place within seven (7) days of the beginning of a hearing, and the Judge elects to make a statement on the record at the hearing summarizing the actions taken.

### § 76.20 Consent Order or settlement prior to hearing.

(a) *Generally.* At any time after the commencement of a proceeding, the parties jointly may move to defer the hearing for a reasonable time to permit negotiation of a settlement or an agreement containing findings and an order disposing of the whole or any part of the proceeding. The allowance of such deferment and the duration thereof shall be at the discretion of the Judge, after consideration of such factors as the nature of the proceeding, the requirements of the public interest, the representations of the parties, and the probability of reaching an agreement which will result in a just disposition of the issue involved. The Judge may require the parties to submit progress reports on a regular basis as to the status of negotiations.

(b) *Consent orders.* Any agreement containing consent findings and an order disposing of a proceeding or any part thereof shall also provide:

- (1) That the order shall have the same force and effect as an order made after full hearing;
- (2) That the entire record on which any order may be based shall consist solely of the complaint or notice of administrative determination (or amended notice, if one is filed), as appropriate, and the agreement;
- (3) A waiver of any further procedural steps before the Judge; and
- (4) A waiver of any right to challenge or contest the validity of the order entered into in accordance with the agreement.

(c) *Submission.* On or before the expiration of the time granted for negotiations, the parties or their counsel may:

- (1) Submit the proposed agreement containing consent findings and an order for consideration by the Judge; or
- (2) Notify the Judge that the parties have reached a full settlement and

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have agreed to dismissal of the action; or

(3) Inform the Judge that agreement cannot be reached.

(d) *Disposition*. In the event that an agreement containing consent findings and an order is submitted, the Judge, within thirty (30) days or as soon as practicable thereafter may, if satisfied with its timeliness, form, and substance, accept such agreement by issuing a decision based upon the agreed findings. The Judge has the discretionary authority to conduct a hearing to determine the fairness of the agreement, consent findings, and proposed order.

### § 76.21 Discovery.

(a) *Scope*. Discovery under this part covers any matter not otherwise privileged or protected by law, which is directly relevant to the issues involved in the case, including the existence, description, nature, custody, condition, and location of documents or other tangible things, and the identity and location of persons having knowledge of relevant facts. To the extent not inconsistent with this part, the Federal Rules of Civil Procedure may be used as a general guide for discovery practices in proceedings before the Judge. However, unless otherwise stated in this part, the Federal Rules shall be deemed to be instructive rather than controlling.

(b) *Methods*. Discovery may be obtained by one or more of the methods provided under the Federal Rules of Civil Procedure, including: written interrogatories, depositions, requests for production of documents or things for inspection or copying, and requests for admission addressed to parties.

(c) *Procedures governing discovery*—(1) *Discovery from a party*. A party seeking discovery from another party shall initiate the process by serving a request for discovery on the other party. The request for discovery shall:

(i) State the time limit for responding, as prescribed in 28 CFR 76.21(c)(4);

(ii) In the case of a request for a deposition of a party or an employee of a party shall

(A) Specify the time and place of the taking of the deposition, and

(B) Be served on the person to be deposed.

(2) *Discovery from a nonparty*. Whenever possible, a party seeking a deposition and/or production of documents from a nonparty shall attempt to obtain the nonparty's voluntary cooperation. A party seeking such discovery from a nonparty may initiate such discovery by serving a request for discovery on the nonparty directly and by serving the other party. Upon failure to obtain voluntary cooperation, discovery from a nonparty may be sought by a written motion directed to the Judge in accordance with paragraph (c)(3) of this section.

(3) *Discovery motions*. (i) A party shall answer a discovery request within the time provided by 28 CFR 76.21(c)(4), either by furnishing to the requesting party the information or testimony requested, agreeing to make deponents available to testify within a reasonable time, or by stating an objection to the particular request and the reasons for objection. Upon the failure of a party to respond in full to a discovery request, the requesting party may file with the Judge a motion to compel. A copy of the motion shall be served on the other party. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance and materiality of the information sought; and

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received.

(ii) If a nonparty will not voluntarily respond to a discovery request in full, the requesting party may file with the Judge a written motion seeking a subpoena. A copy of the motion shall be served on the other party in accordance with 28 CFR 76.23. The motion shall be accompanied by:

(A) A copy of the original request and a statement showing the relevance, materiality and reasonable scope of the information sought;

(B) A copy of the objections to discovery or, where appropriate, a statement with accompanying affidavit that no response has been received; and